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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 SUSAN A. PRICE,

No. CIV.S-04-1235 GEB DAD PS

12 Plaintiff,

13 v.

FINDINGS AND RECOMMENDATIONS

14 CALIFORNIA DEPARTMENT OF
15 CORRECTIONS, CORRECTIONAL
TRAINING FACILITY, SOLEDAD,

16 Defendant.
17 _____/

18 This matter is before the court on defendant California
19 Department of Corrections and Rehabilitation's ("CDC") motion for
20 summary judgment, or in the alternative, summary adjudication.

21 Barton R. Jenks appeared on behalf of defendant at the hearing on the
22 motion on February 17, 2006. Plaintiff, proceeding pro se, appeared
23 on her own behalf. Having considered all written materials submitted
24 in connection with the motion, and after hearing oral argument, for
25 the reasons set forth below the undersigned will recommend that the
26 motion for summary judgment be granted and this action be dismissed.

LEGAL STANDARDS

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Owen v. Local No. 169, 971 F.2d 347, 355 (9th Cir. 1992).

The party moving for summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

"[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Celotex Corp., 477 U.S. at 323. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. See id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the

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1 standard for entry of summary judgment, as set forth in Rule 56(c),
2 is satisfied." Id. at 323.

3 If the moving party meets its initial responsibility, the
4 burden then shifts to the opposing party to establish that a genuine
5 issue as to any material fact actually does exist. Matsushita Elec.
6 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); see also
7 First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89
8 (1968); Ruffin v. County of Los Angeles, 607 F.2d 1276, 1280 (9th
9 Cir. 1979), cert. denied, 455 U.S. 951 (1980). The opposing party
10 must demonstrate that the fact in contention is material, i.e., a
11 fact that might affect the outcome of the suit under the governing
12 law, and that the dispute is genuine, i.e., the evidence is such that
13 a reasonable jury could return a verdict for the nonmoving party.
14 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec.
15 Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630
16 (9th Cir. 1987). Thus, the "purpose of summary judgment is to
17 'pierce the pleadings and to assess the proof in order to see whether
18 there is a genuine need for trial.'" Matsushita, 475 U.S. at 587
19 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963
20 amendments).

21 In resolving the summary judgment motion, the court
22 examines the pleadings, depositions, answers to interrogatories, and
23 admissions on file, together with the affidavits, if any. Rule
24 56(c); see also SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th
25 Cir. 1982). The evidence of the opposing party is to be believed,
26 Anderson, 477 U.S. at 255, and all reasonable inferences that may be

1 drawn from the facts placed before the court must be drawn in favor
2 of the opposing party, Matsushita, 475 U.S. at 587 (citing United
3 States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam)); see
4 also United States v. First Nat'l Bank of Circle, 652 F.2d 882, 887
5 (9th Cir. 1981). Nevertheless, inferences are not drawn out of the
6 air, and it is the opposing party's obligation to produce a factual
7 predicate from which the inference may be drawn. See Richards v.
8 Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985),
9 aff'd, 810 F.2d 898, 902 (9th Cir. 1987).

10 Finally, "[a] scintilla of evidence or evidence that is
11 merely colorable or not significantly probative does not present a
12 genuine issue of material fact" precluding summary judgment. Addisu
13 v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). See also
14 Summers v. A. Teichert & Son, Inc., 127 F.3d 1150, 1152 (9th Cir.
15 1997). On summary judgment the court is not to weigh the evidence or
16 determine the truth of the matters asserted but must only determine
17 whether there is a genuine issue of material fact that must be
18 resolved by trial. See Summers, 127 F.3d at 1152. Nonetheless, in
19 order for any factual dispute to be genuine, there must be enough
20 doubt for a reasonable trier of fact to find for the plaintiff in
21 order to defeat a defendant's summary judgment motion. See Addisu,
22 198 F.3d at 1134.

23 ANALYSIS

24 Plaintiff's second amended complaint ("complaint") is
25 brought under Title VII of the Civil Rights Act of 1964 and alleges
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1 that she was discriminated against in her employment on the basis of
2 race. The following facts are undisputed unless otherwise noted.

3 Plaintiff began her employment with CDC in December of
4 2002, as an office assistant/typist in the file room of the Records
5 Department of the Correctional Training Facility at Soledad ("CTF").
6 On March 17, 2003, plaintiff injured her hand while working.
7 Plaintiff took leave until April 10, 2003, whereupon she returned to
8 work and was assigned to light duty clerical work.

9 During a staff meeting in April of 2003, plaintiff had a
10 disagreement with her supervisor regarding assigning lunch times to
11 employees pursuant to state policy. Following that exchange
12 plaintiff was issued an "Employee Counseling Record" on May 7, 2003,
13 warning her of insubordination. Plaintiff alleges that following
14 this incident she was subjected to ongoing harassment by her
15 supervisor, who is Caucasian, and other employees and management
16 staff, who are Caucasian and Hispanic. Plaintiff is African-
17 American. Plaintiff was issued at least one more Employee Counseling
18 Record on May 23, 2003, for insubordinate conduct during another
19 meeting. As a result of the alleged harassment, plaintiff left work
20 on May 23, 2003, and did not return for several months as explained
21 below.

22 On June 13, 2003, plaintiff sent a letter to the warden
23 which referenced "abusive supervision" as well as a desire to "move
24 on" and put the matter behind her. Plaintiff asked for wages owed.
25 In a letter to plaintiff dated June 18, 2003, the warden accepted
26 plaintiff's apparent letter of resignation. Plaintiff responded to

1 that letter, clarifying that she did not wish to resign, but instead
2 desired a transfer. In response, defendant notified plaintiff that
3 she was being reinstated plaintiff's employment to her former
4 position at CTF, effective July 30, 2003.

5 However, plaintiff did not return to work as scheduled. As
6 a result, pursuant to state statute, defendant terminated plaintiff
7 as absent without leave ("AWOL") as of August 8, 2003. Plaintiff
8 administratively appealed that termination and as part of a
9 settlement of the appeal she was again reinstated to her prior
10 position effective November 3, 2003.

11 Plaintiff returned to work on November 3, 2003, but
12 continued to complain of harassment. For example, plaintiff alleges
13 that defendant intentionally failed to process her health insurance
14 paperwork upon returning to work and maliciously required her to
15 complete a new six-month period of probation. Plaintiff again left
16 work in December of 2003, complaining of a hostile work environment.
17 She was again terminated as AWOL as of December 18, 2003. Plaintiff
18 administratively appealed that decision as well but the appeal was
19 dismissed for lack of jurisdiction. This lawsuit followed.

20 A liberal construction of plaintiff's complaint reveals
21 causes of action for (1) hostile work environment due to racial
22 harassment; (2) discrimination (disparate treatment) based on race;
23 and (3) retaliation for engaging in protected activity. For the
24 reasons set forth below, defendant is entitled to summary judgment in
25 its favor on all of plaintiff's claims.

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1 With respect to her first claim, plaintiff has pointed to
2 no evidence in support of a claim for hostile work environment due to
3 racially-based harassment as alleged in her unverified second amended
4 complaint. Plaintiff has presented no evidence, as she must to
5 prevail, that (1) she was subjected to verbal or physical conduct
6 directed at her because of her race; (2) this conduct was unwelcome;
7 and (3) the conduct was severe or pervasive enough to alter the
8 conditions of employment and create an abusive working environment.
9 Meritor v. Sav. Bank v. Vinson, 477 U.S. 57, 64-68 (1986); Manatt v.
10 Bank of Am., 339 F.3d 792, 798 (9th Cir. 2003). Rather, at her
11 deposition plaintiff referred merely to instances which she
12 characterized as harassment (being assigned light duty in a different
13 office location upon her return from a thumb injury in April 2003,
14 reprimanded for failing to carry out job assignments, having a
15 specific lunch time assigned to her, cited for insubordination and
16 placed on probation). (Def.'s Notice of Mot. & Mot. for Summ. J.,
17 Attachment 1.) Indeed, plaintiff provided several possible
18 explanations for the motivation behind these actions, one of which
19 was based on speculation that perhaps her supervisors did not like
20 her and did not like "Black people, particularly." (Id.) Such
21 speculation does not constitute evidence from which a reasonable
22 trier of fact could find in plaintiff's favor on this claim.

23 Because of this complete failure of proof, defendant's
24 motion for summary judgment should be granted as to the hostile work
25 environment cause of action.

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1 With respect to the retaliation claim, in order to
2 establish a prima facie case of retaliation,¹ plaintiff must produce
3 specific evidence that she (1) engaged in statutorily protected
4 activity; (2) thereafter suffered an adverse employment action at the
5 hands of her supervisors and (3) a causal link exists between her
6 protected activity and the adverse employment action. Ray v.
7 Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000); Steiner v. Showboat
8 Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994). With respect to
9 the last aspect of this showing, plaintiff must present evidence
10 sufficient to raise an inference that her protected activity was the
11 "likely reason" for the adverse action. Cohen v. Fred Meyer, Inc.,
12 686 F.2d 793, 796 (9th Cir. 1982).

13 Here, defendant concedes for the purposes of its motion
14 that plaintiff engaged in a protected activity, plaintiff having
15 filed an internal complaint with the equal employment officer as well
16 as a claim with the state Department of Fair Employment and Housing
17 in the summer of 2003. However, defendant persuasively argues that
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19 ¹ Retaliation claims brought under Title VII are analyzed under
20 the McDonnell-Douglas burden shifting framework. McDonnell Douglas
21 Corp. v. Green, 411 U.S. 792 (1973); Yartzoff v. Thomas, 809 F.2d
22 1371, 1375 (9th Cir. 1987). The plaintiff must first present a prima
23 facie case of retaliation. Yartzoff, 809 F.2d at 1375. The evidence
24 required at this stage is minimal and need not meet the preponderance
25 of the evidence standard. Aragon v. Republic Silver State Disposal
26 Inc., 292 F.3d 654, 659 (9th Cir. 2002). If she succeeds in
establishing a prima facie case, there is a rebuttable presumption
that the defendant committed unlawful discrimination. Dominquez-
Curry v. Nevada Transp. Dept., 424 F.3d 1027, 1037 (9th Cir. 2005).
If the defendant offers a legitimate reason for adverse employment
action, the presumption is defeated and the burden shifts back to the
plaintiff to create a genuine issue of material fact as to whether
the proffered reason is pretext for discrimination. Id. at 1037.

1 there was no adverse employment action taken against plaintiff much
2 less any evidence supporting a causal link between the protected
3 activity and an adverse employment action.

4 Plaintiff's only attempt to challenge defendant's arguments
5 is her citation to the June 18, 2003, letter from the warden
6 accepting her apparent resignation. That letter advised, in relevant
7 part: "Should the Department be contacted by your prospective
8 employers for information regarding your resignation, the
9 circumstances surrounding your resignation will be disclosed."

10 (Def.'s Notice of Mot. & Mot. for Summ. J., Attachment 1, Ex. L.)
11 However, once plaintiff clarified that she did not wish to resign,
12 but instead desired a transfer, defendant reinstated plaintiff's
13 employment to her former position at CTF. Thus, the warden's letter
14 does not amount to an adverse employment action. See Ray, 217 F.3d
15 at 1242-43 (9th Cir. 2000) (adverse employment action is "any adverse
16 treatment that is based on a retaliatory motive and is reasonably
17 likely to deter the charging party or others from engaging in
18 protected activity").

19 Nor do the terminations of plaintiff's employment for being
20 AWOL constitute adverse employment actions. See Cal. Gov't Code §
21 19996.2(a) ("Absence without leave, whether voluntary or involuntary,
22 for five consecutive working days is an automatic resignation from
23 state service, as of the last date on which the employee worked.");
24 Coleman v. Department of Personnel Administration, 52 Cal. 3d 1102,
25 1115 (1991) ("Under the AWOL statute, when an employee is absent
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1 without leave for five consecutive working days, it is the employee
2 who severs the employment relationship, not the state.").

3 Additionally, plaintiff simply has offered no evidence of
4 the required causal link between her protected activity and any
5 adverse employment action. For these reasons, defendant's motion
6 should be granted as to plaintiff's retaliation claim.

7 Finally, the McDonnell-Douglas burden shifting framework
8 also applies to the disparate treatment claim. Coghlan v. American
9 Seafoods Co. LLC., 413 F.3d 1090, 1093-94 (9th Cir. 2005). To
10 establish a prima face case of discrimination based on race plaintiff
11 must show that she (1) belongs to a protected class, (2) was
12 performing according to her employer's legitimate expectations, (3)
13 was subject to an adverse employment action, and (4) similarly
14 situated individuals outside of her protected class were treated more
15 favorably. See Reeves v. Sanderson Plumbing, 530 U.S. 133, 142
16 (2000); Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1220 (9th Cir.
17 1998).

18 Plaintiff's discrimination claim fails for the same reasons
19 as her retaliation claim. As discussed above, neither the letter
20 from the warden nor the AWOL notices constitute adverse employment
21 actions. Moreover, plaintiff has failed to present any evidence
22 suggesting that similarly situated individuals outside of plaintiff's
23 protected class were treated more favorably than she. Therefore,
24 summary judgment in defendant's favor should be granted as to
25 plaintiff's discrimination claim as well due to plaintiff's complete
26 failure of proof.

1 **CONCLUSION**

2 As noted at the hearing on this motion, the undersigned is
3 mindful of the difficulties faced by pro per litigants in responding
4 to summary judgment motions in particular. Nonetheless, in this case
5 there is a complete absence of evidence suggesting that plaintiff was
6 unlawfully discriminated against in any fashion. There being no
7 genuine issue as to any material fact with respect to any of
8 plaintiff's claims, defendant is entitled to judgment in its favor as
9 a matter of law.

10 Accordingly, IT IS HEREBY RECOMMENDED that defendant's
11 motion for summary judgment be granted and this action be dismissed.

12 These findings and recommendations are submitted to the
13 United States District Judge assigned to the case, pursuant to the
14 provisions of 28 U.S.C. § 636(b)(1). Within ten (10) days after
15 being served with these findings and recommendations, any party may
16 file written objections with the court and serve a copy on all
17 parties. Such a document should be captioned "Objections to
18 Magistrate Judge's Findings and Recommendations." The parties are
19 advised that failure to file objections within the specified time may
20 waive the right to appeal the District Court's order. See Martinez
21 v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

22 DATED: March 20, 2006.

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25 DALE A. DROZD
26 UNITED STATES MAGISTRATE JUDGE

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